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# The Review

## Trends in Government Disclosure



*Public Records Division*
*Office of the Massachusetts Secretary of State*
***Michael Joseph Connolly, Secretary***

# *The* Review

## *Trends in Government Disclosure*

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# EXEMPTION INDEX

# DETERMINATIONS

SPR90/364

**ISSUE:** Whether exemption (b) permits the withholding of information relating to private police details used to protect a foreign dignitary, while that dignitary remains in a police department's jurisdiction.

**HELD:** Exemption (b) permits the withholding of those records which would indicate the number of officers assigned to protect the dignitary at any given time. However, the exemption does not protect information which merely reflects names of officers who performed the detail work, or amount of money paid for the details. No records may be withheld after the dignitary departs.

**RATIONALE:** Two criteria must be satisfied in order for exemption (b) to apply. First, the requested records must relate solely to the internal personnel rules and practices of the record custodian. Second, there must be a showing that the proper performance of necessary governmental functions requires their withholding. Detail records relate solely to the internal practices of a police department. The sole purpose of such records is to properly compensate police officers for their detail work. Additionally, release of detail records in their entirety would undermine the department's necessary governmental function of protecting a foreign dignitary's life. Examination of those records would enable a potential assassin to estimate how many police officers would be assigned to that official at any given time. Exemption (b), therefore, permits the withholding of records to the extent necessary to allow the department to protect the dignitary.

However, a bare list of names of every officer who has performed detail work would in no way indicate how many officers are assigned to the dignitary at any given time. Likewise, disclosure of the total current sum of money paid to the officers would not betray the size of his security detail. Such information may not be withheld under exemption (b). Finally, once the foreign dignitary leaves the jurisdiction, the department will have no duty to protect him and the exemption will be completely inapplicable.

**SPR90/438**

**ISSUE:** Whether records of the Office of the Inspector General are public record.

**HELD:** None of the records held by the Inspector General's office is public.

**RATIONALE:** The statutory exclusion of the Inspector General's records from the mandatory disclosure provision of the Public Records Law is clear. "All records of the office of the inspector general...shall not be public records as defined in section seven of chapter four..." G. L. c. 12A, § 13 (1988 ed.). Accordingly, exemption (a) allows the withholding of any of the Inspector General's records.

**SPR91/078**

**ISSUE:** Whether the absentee voters list which only includes the names of voters who qualify as permanently and physically disabled is public record.

**HELD:** The absentee voters list which enumerates only those voters who qualify as permanently and physically disabled is exempt from mandatory disclosure by virtue of exemption (c).

**RATIONALE:** The first clause of exemption (c) exempts all medical information that is of a personal nature. The absentee voters list at issue directly identifies individuals and specifies that they are disabled. Clearly, this medical information is of a personal nature, and is therefore exempt from mandatory disclosure pursuant to exemption (c).

It should be noted that the list at issue is separate from the Absentee Voter List (AV List) posted for public inspection as mandated by statute. G. L. c. 54, § 91 (1988 ed.). The AV List includes the names and addresses of all absentee voters and does not distinguish between disabled and nondisabled individuals. Id. Accordingly, the privacy interests of individuals on the AV List are not at stake. Moreover, the Absentee Voters statute requires that the AV List be posted publicly, as stated above.

**SPR91/079**

**ISSUE:** Whether the rank-ordering of a finalist for the position of police chief is a public record, where the identities of all six (6) finalists are known to the public.

**HELD:** The privacy exemption does not prevent an individual finalist from obtaining access to his rank-ordering for a position of public employment.

**RATIONALE:** The rank-ordering of a finalist for a position of public employment is arguably personnel information. However, where the requester is the subject of the rank-ordering, that information cannot be considered as being of a "personal nature" as to him. Since a requester implicitly waives any privacy claims with respect to records concerning himself, the only privacy interests implicated by the release of his rank-ordering are those of the other five (5) finalists.

Where the public knows the identity of six (6) finalists, release of an individual's rank-ordering will only further reveal where each of the other five (5) did not place. Such information cannot be considered "personal" in nature. Indeed, the rank-ordering of those eligible for civil service employment is public record. G. L. c. 31, § 25 (1988 ed.). So, too, should a non-civil service rank-ordering be made public.

**SPR91/129**

**ISSUE:** Whether information contained in a police department's protective custody forms is public record.

**HELD:** Those portions of a protective custody form which are required to be documented by statute are public record. Certain additional entries may be withheld under exemption (c).

**RATIONALE:** The protective custody statute mandates that certain information be recorded by police when an individual is taken into protective custody. G. L. c. 111B, § 8 (1988 ed.). Under the prior definition of public records, all records made pursuant to a requirement of law are public

records. 1962 Mass. Acts 427, § 1. In adopting the more expansive definition of public records, the Legislature stated that the new definition of public records should not be construed to exempt any record which had previously been a public record. 1973 Mass. Acts 1050, § 6. Therefore, the portions of protective custody forms mandated by the protective custody statute are public records subject to mandatory disclosure.

However, additional entries, such as the record subject's age, date of birth, marital status, sex, height, weight, and race, are not mandated by the protective custody statute. Thus, the grandfather provision of the Public Records Law does not provide that these additional entries are public records. Rather, such additional entries are merely presumed to be public record unless the record custodian demonstrates the applicability of a statutory exemption.

The additional entries are intimate details highly personal in nature and are precisely the type of information to which the second clause of exemption (c) applies. Moreover, the public interest in disclosure of those details is minimal. In fact, the public interest in assuring that police are properly performing their duty is sufficiently served by release of only those details required to be kept by statute. Thus, with respect to the additional entries, the record subject's privacy interest outweighs the public's interest in disclosure. Accordingly, exemption (c) allows the withholding of that information.

Finally, written comments made on a report by a police officer, suggesting that a record subject may have engaged in criminal activity, are also exempt. Where those comments are essentially unsubstantiated allegations, the public interest in disclosure is minimal and is outweighed by the privacy interest of the subject.

SPR91/175

**ISSUE:** Whether a consultant's report concerning allegations of racism at a jail and house of correction may be withheld pursuant to exemption (b).

**HELD:** Exemption (b) does not allow the withholding of a report about racism alleged to have occurred at a government facility.

**RATIONALE:** Two criteria must be satisfied in order for exemption (b) to apply. First, the requested records must relate solely to the internal personnel rules and practices of the record custodian. Second, there must be a showing that the proper performance of necessary governmental functions requires their withholding.

A report concerning allegations that public officials engaged in racist behavior while carrying out their official duties clearly relates to the internal personnel practices of the sheriff's office. However, where that report presents a detailed picture of the racial situation as seen through the eyes of various agency personnel, the public has a great interest in the contents of the report. Such a report cannot, therefore, be considered as relating solely to the internal personnel practices of the agency. Additionally, release of such a report could not impair the agency from performing its necessary governmental functions. The sheriff's office will keep inmates secured in the jail and house of correction regardless of whether a report on racism is made public. Therefore, as neither criterion of exemption (b) is satisfied, the exemption does not allow the withholding of the report in question.

SPR91/201

**ISSUE:** Whether laboratory test results relating to the amount of lead in blood samples are public record.

**HELD:** Blood test results are medical information and may be withheld to the extent that they relate to an identifiable individual.

**RATIONALE:** Medical information relating to an identifiable individual is categorically exempt from disclosure pursuant to exemption (c). Blood test results clearly constitute medical information. Therefore, a record custodian may redact the names and other details which would identify the subjects of blood tests before releasing the results of those tests.

SPR91/207

**ISSUE:** Whether the Public Records Law requires the State Ethics Commission to release the name of a complainant, where a preliminary inquiry fails to indicate reasonable cause to believe that the Conflict of Interest Law has been violated by the subject of the complaint.

**HELD:** Where a preliminary inquiry fails to indicate reasonable cause to believe that the Conflict of Interest Law has been violated, no records relating to that inquiry are public. In all cases, the identity of the complainant must be kept confidential.

**RATIONALE:** The Conflict of Interest Law provides that all Ethics Commission "proceedings and records relating to a preliminary inquiry or initial staff review to determine whether to initiate an inquiry shall be confidential...." G. L. c. 268B, § 4(a) (1990 ed.). Additionally, the Ethics Commission regulations provide that "[t]he identity of a complainant shall be kept confidential by Commission members and employees." 930 C.M.R. 3.01(5). Since a complaint letter is part of the record of a preliminary inquiry, no portion of such a letter, including a complainant's name, may be disclosed. Additionally, a complainant's identity must always be kept confidential pursuant to the above cited regulations. Therefore, exemption (a) allows the withholding of Ethics

**SPR91/207** (cont'd)

Commission records containing the name of a complainant.

**SPR91/359**

**ISSUE:** Whether written answers in response to "Questions for Fire Chief Candidates" are public records.

**HELD:** Neither exemption (b) nor exemption (c) permits the withholding of those answers.

**RATIONALE:** Two criteria must be satisfied in order for exemption (b) to apply. First, the requested records must relate solely to the internal personnel rules and practices of a governmental agency. Second, there must be a showing that the proper performance of necessary governmental functions requires their withholding.

Records which have been found to relate solely to the internal personnel rules and practices of a governmental agency include materials relating to parking assignments and lunch room schedules. However, written responses generated by candidates for fire chief cannot be likened to such trivial information. The public has a great interest in the responses of candidates for such an important position. Thus, those responses do not relate solely to the internal workings of a fire department.

Moreover, it is difficult to find that release of such responses would in any way hinder a department in the performance of its duties. Since the records satisfy neither criterion of exemption (b), they may not be withheld thereby.

Exemption (c) permits the withholding of personnel information which is of a personal nature. Responses to questions posed to candidates as part of an application process can fairly be considered part of their personnel file. However, those responses are merely replies to factual or hypothetical questions relating to various situations which a successful applicant may encounter. As such, those answers are neither self-assessments, nor assessments by others of an individual's qualifications. Thus, the responses are not evaluative or otherwise personal in nature. Therefore, exemption (c) does not apply.

SPR91/365

**ISSUE:** Whether a city council may validly enact an ordinance which would exempt from public disclosure a list of vacant or abandoned buildings.

**HELD:** A record may be withheld only if it is covered by one of the statutory exemptions to the definition of public records. As no such exemption applies to a list of vacant or abandoned buildings, that list is a public record.

**RATIONALE:** A city may only enact an ordinance if it is not repugnant to existing law. Const. Amend. Art. 2, § 6; G. L. c. 43B, § 13 (1990 ed.). Moreover, an ordinance cannot be given effect if the relevant general law evidences an intent on the part of the legislature to preclude local action. Bloom v. City of Worcester, 363 Mass. 136, 145-46 (1973); Amherst v. Attorney General, 398 Mass. 793, 795-97 (1986). Therefore, as the legislature has defined public records to be those government records not covered by an exemption, no city record may be withheld if not covered by such an exemption. See G. L. c. 4, § 7(26)(a)-(l) (1990 ed.) (defining "public records").

Exemption (a) only allows the withholding of those records which are exempt from disclosure by statute. G. L. c. 4, § 7(26)(a) (1990 ed.). City ordinances are not statutes and cannot, therefore, provide a basis for withholding a record under exemption (a).

Two criteria must be satisfied in order for exemption (b) to apply. First, the record must relate solely to the internal personnel rules and practices of a governmental agency. Second, there must be a showing that the proper performance of necessary governmental functions requires its withholding.

Records which have been found to relate solely to the internal personnel rules and practices of a governmental agency include materials relating to parking assignments, and lunch room schedules. However, a list of abandoned or vacant buildings cannot be likened to such trivial information. The public has a significant interest in knowing which buildings in a municipality are vacant or abandoned. Vacant and abandoned buildings tend to

**SPR91/365** (cont'd)

lower the value of surrounding properties, as well as diminish a neighborhood's safety. Thus, a list of such buildings does not satisfy the first clause of exemption (b).

Moreover, it is not clear that release of a list of vacant or abandoned buildings would impede the government in its performance of necessary functions. Presumably, a fire department's response to a listed building's address would not change if the list were made public. Furthermore, while vacant and abandoned buildings can foster criminal activity, the fact that such buildings are unoccupied is usually apparent by their condition. Thus, it is doubtful that the second clause of exemption (b) is satisfied by a list of vacant or abandoned buildings. Since the list clearly does not satisfy both prongs of exemption (b), it may not be withheld thereby.

**SPR91/369**

**ISSUE:** Whether audit letters, audit logs, and subpoenas, all in the custody of the Office of Campaign and Political Finance (OCPF), are public record.

**HELD:** Audit logs may be withheld under exemption (b). None of the records may be withheld under exemption (c). Exemption (f) permits the withholding of certain audit letters and subpoenas.

**RATIONALE:** Two criteria must be satisfied in order for exemption (b) to apply. First, the record must relate solely to the internal personnel rules and practices of a governmental agency. Second, there must be a showing that the proper performance of necessary governmental functions requires its withholding.

Audit letters and subpoenas, by their very nature, do not relate solely to the internal rules or practices of the OCPF. Because those materials are received by various parties outside the OCPF, they necessarily relate to matters beyond the inner workings of OCPF personnel.

Audit logs, on the other hand, are created solely for the use of the OCPF. They are a means of

verifying the accuracy and completeness of campaign finance reports. Thus, the logs can fairly be characterized as relating solely to the internal practices of the OCPF. Moreover, release of completed logs would impair the OCPF in the performance of its duties. The logs are kept in such a way that release in their completed form would reveal the procedures employed by the OCPF in the audit process. If such information were released, an individual could ascertain the types of data the OCPF analyzes. One could also deduce the patterns of information on which the OCPF focuses. By giving insight into the OCPF's audit procedures, a political candidate or committee could tailor their OCPF filings in an attempt to avoid an audit. Clearly, such possibility would hinder the OCPF in the performance of its duties under the Campaign Finance Law. Accordingly, the audit logs satisfy both clauses of exemption (b).

Exemption (c) allows the withholding of those materials which constitute "intimate details of a highly personal nature." Certain audit letters suggest that a candidate or committee has not been cooperative with the OCPF. Such letters, however, do not necessarily imply that the Campaign Finance Law has been violated. Similarly, the issuance of a subpoena to an individual does not reveal intimate facts about the person; rather it merely requires the person's presence for testimony. Any conclusion made on the basis of the issuance of a subpoena is mere conjecture. Clearly, a candidate for elective office must expect public scrutiny of his campaign and cannot have a legitimate expectation of privacy in routine administrative matters. Therefore, on their face, audit letters and subpoenas do not raise a significant privacy interest. Thus, audit letters and subpoenas are not covered by exemption (c).

The general purpose of exemption (f) is the avoidance of premature disclosure of the Commonwealth's case prior to trial and the prevention of disclosure of confidential investigative techniques, procedures, or sources of information. Audit letters are routinely issued and reveal nothing confidential about the OCPF's investigative procedures. Thus, audit letters generally are not encompassed by exemption (f). Subpoenas, however, may fall within the parameters of the exemption. For example, release

of such information during a pending investigation could reveal the direction of the Commonwealth's case and allow the subject of an investigation to conceal evidence. To the extent that release of a subpoena would undermine the OCPF's investigative efforts, it may be withheld pursuant to exemption (f).

## SPR91/396

**ISSUE:** Whether statements provided to the Department of Industrial Accidents (DIA) in connection with its investigation of the validity of claims made against the Worker's Compensation Trust Fund (Fund) are public records.

**HELD:** Exemption (f) permits the withholding of the names and other information which would tend to identify a witness, informant, or other source of information.

**RATIONALE:** The general purpose of the investigatory exemption is the avoidance of premature disclosure of the Commonwealth's case prior to trial and the prevention of disclosure of confidential investigative techniques and procedures. The exemption is also intended, however, to allow investigative officials to provide an assurance of confidentiality to individuals so that they will speak openly about matters under investigation. Consequently, there is no requirement that an investigative agency demonstrate prejudice to an on-going investigation in order to withhold the identities of voluntary witnesses.

When a claim is made against the Fund, the DIA may conduct an investigation regarding that claim. The purpose of the investigation is to ascertain the cause of the alleged injury and ensure that the claim is valid. During the course of the investigation, various individuals are interviewed and statements are taken. Since those individuals make statements voluntarily, their identities may be withheld under the investigatory exemption. Likewise, the statements themselves may be withheld to the extent that their release could identify the witnesses who made them.

SPR91/415;
SPR91/436

**ISSUE I:** Whether records which have been determined by a record custodian to be not public and thus printed on pink paper to indicate that fact are nevertheless subject to public disclosure.

**HELD:** A record may be withheld only if an exemption to the definition of public records applies.

**RATIONALE:** Printing of a document on a pink sheet of paper reflects the record custodian's view that the record is not public. However, the mere fact that a document is printed on pink paper does not, per se, exempt that record from disclosure. Only a statutory exemption to the definition of public records can operate to allow the withholding of a record. G. L. c. 4, § 7(26)(a)-(l) (1990 ed.). Thus, any local governing provision banning disclosure of a record, without a showing that a statutory exemption applies, would constitute an invalid exercise of local power.

**ISSUE II:** Whether a letter from one select board member to other members criticizing relations between those individuals is a public record.

**HELD:** Such a letter may be withheld pursuant to exemption (c).

**RATIONALE:** Exemption (c) allows the withholding of personnel information of a "personal nature". A communication from one public official to her colleagues, relating her perception of their professional relationships, can fairly be characterized as personnel information.

Such a letter is also "personal" in nature. Information which is evaluative can be particularly personal and volatile and thus personal in nature. As a letter critiquing the relations of board members is clearly evaluative, it constitutes personnel information of a personal nature and may be withheld under exemption (c).

SPR91/423

**ISSUE:** Whether records relating to a disciplinary hearing, conducted in executive session and pursuant to the provisions of the Civil Service Statute, are public.

**HELD:** Neither the privacy exemption, the Open Meeting Law, nor the Civil Service Statute permits the withholding of such records.

**RATIONALE:** Under the second clause of exemption (c), "intimate details of a highly personal nature" may be withheld if the record subject's privacy interest outweighs the public's interest in disclosure.

There is a great privacy interest in records relating to unresolved allegations of official misconduct. That privacy interest generally outweighs the public interest in disclosure of such records.

On the other hand, once allegations have been resolved, a public official has a greatly reduced privacy interest, since it is presumed that the investigation was conducted fairly. That diminished privacy interest is outweighed by the public's interest in the outcome of the investigation, as well as the manner in which it was conducted. Thus, records relating to closed investigations into such allegations are not encompassed by exemption (c) and are subject to mandatory disclosure.

The minutes of an executive session may remain secret until such time as their disclosure no longer defeats the lawful purpose for which the meeting was called. G. L. c. 39, § 23B (1990 ed.). Where an executive session is held to hear complaints or charges brought against a public employee, the purpose for that session is to protect the privacy interests of the employee in question. However, as discussed above, when allegations of misconduct against a public employee are resolved, he no longer has a protectable privacy interest. Thus, release of executive session records relating to those allegations will not defeat the executive session purpose of protecting the employee's privacy.

**SPR91/423** (cont'd)

Finally, the Civil Service Statute does not require that records of a hearing held pursuant thereto be kept confidential. That statute merely permits an employee to opt for either a public or private hearing. G. L. c. 31, § 41 (1990 ed.). Indeed, the statute provides that the records of completed Civil Service Commission hearings are open to public inspection. G. L. c. 31, § 70 (1990 ed.). Therefore, the Civil Service Statute does not provide a basis for withholding disciplinary hearing records relating to resolved allegations.

**SPR91/456**

**ISSUE:** Are records of the Register of Probate subject to the Public Records Law.

**HELD:** Records of the Register of Probate are considered court records and therefore are not subject to the Public Records Law.

**RATIONALE:** The salaries of probate registers are paid in accordance with the pay plan established by the chief administrative justice of the trial court. G. L. c. 217, § 35A (1990 ed.). Moreover, the powers and duties of probate registers are set forth in the general law entitled "Judges and Registers of Probate and Insolvency," which appears in Title I of Part III, "Courts and Judicial Officers." G. L. c. 217 (1990 ed.). Therefore, registers of probate are court employees. Their records are considered court records and are not subject to the Public Records Law.

**SPR91/460**

**ISSUE:** How much time may a record custodian take to comply with a request for public records.

**HELD:** A record custodian must comply with a request for public records at reasonable times, without unreasonable delay, and in any case within ten (10) days of his receipt of the request.

**SPR91/460** (cont'd)

**RATIONALE:** The Public Records Law requires that a record custodian always comply with a pubic records request within ten (10) days of its receipt. G. L. c. 66, § 10(b) (1990 ed.); 950 C.M.R. 32.05(2). However, the ten-day provision is a maximum, rather than a minimum, time frame for complying with a public records request. The Public Records Law also requires a custodian to provide access as soon as is practicable and without unreasonable delay. G. L. c. 66, § 10(a) (1990 ed.); 950 C.M.R. 32.05(2).

Necessarily, response time will vary, depending upon the type and volume of records requested, the available staff, and the backlog of other requests. For example, it would be unreasonable to require that a requester wait for supervisor approval before gaining access to records which are readily available and clearly public, such as building permits. Conversely, where there is a legitimate question as to the requested document's public record status, a consultation with either town counsel or members of the Public Records Division may be necessary before responding.

**SPR92/003**

**ISSUE:** Whether the victim of an alleged sexual assault must be provided with access to a police report about the incident.

**HELD:** A police department may, but need not, disclose a sexual assault report to the alleged victim.

**RATIONALE:** The rape shield law states in pertinent part that "[a]ll reports, of rape and sexual assault...shall not be public reports and shall be maintained by the police departments in a manner which will assure their confidentiality..." G. L. c. 41, § 97D (1990 ed.). Where the victim of an alleged sexual assault is provided with access to a report of the incident, the confidentiality provision of the statute is not violated. Therefore, a police department may release such a report to the victim without violating the rape shield law. However, the statutory language is also explicit in providing that sexual assault reports are not public records. Thus, exemption (a) allows the withholding of such reports from any requester.

SPR92/037

**ISSUE:** Whether records related to the assets of a resident patient at a Department of Mental Retardation (DMR) facility are public.

**HELD:** Exemption (a) permits the withholding of such financial information.

**RATIONALE:** Records concerning "the admission, treatment and periodic review of all persons admitted to [DMR] facilities" are not open to public inspection. G. L. c. 123B, § 17 (1990 ed.). Additionally, the DMR has adopted regulations concerning residents' records. Specifically, a resident's record must include the documentation of a resident's financial transactions, including the delegated responsibility for the management of a resident's assets. 104 C.M.R. 20.52. Moreover, the DMR regulations require confidentiality of such records. 104 C.M.R. 20.11. Therefore, records pertaining to a resident's assets may be withheld pursuant to exemption (a).

SPR92/065

**ISSUE:** Whether residency cards for municipal employees are public record.

**HELD:** Records relating to the home addresses of public employees cannot be withheld under the privacy exemption.

**RATIONALE:** A public employee's residency card, indicating that individual's home address, is clearly personnel information. Such information, however, can only be withheld under the first clause of exemption (c) if it is of a "personal nature." Massachusetts courts have consistently held that a public employee's home address is not of a sufficiently personal nature to warrant withholding. Therefore, public employee residence cards cannot be considered personnel information of a personal nature and must be disclosed.

**SPR92/071**

**ISSUE:** Whether a consultant's report concerning a parcel of property is public record, where that report is submitted to a local planning board which is interested in the development of the property.

**HELD:** Exemption (g) allows the withholding of such a report.

**RATIONALE:** A record may be withheld under exemption (g) only if it satisfies all six (6) of the exemption's criteria. The criteria are:

(1) trade secrets or commercial or financial information;
(2) voluntarily provided to an agency;
(3) for use in developing government policy;
(4) upon a promise of confidentiality;
(5) information not submitted as required by law;
(6) information not submitted as a condition of receiving a government contract or benefit.

The report in question contains a description of the property, a market analysis, the purchase price, demographic information, and an estimate of renovation costs. Such information can fairly be considered commercial in nature, thus satisfying the first criterion. The report was printed to assist the planning board in deciding how to proceed with the development of idle property. The third criteria is therefore met.

Additionally, the report was voluntarily submitted, upon a promise of confidentiality, and not as a requirement of law or as a condition of receiving a government benefit or contract.

As the report satisfies all six (6) exemption (g) criteria, it may be withheld.

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